QUESTIONS PRESENTED

1. Is the statement made by respondents in a union organizing campaign that petitioner "Preston Drummer is a liar" and other similar statements protected as a matter of federal labor law policy so as to deprive petitioner Preston Drummer summarily from any relief in an action for libel brought pursuant to Florida State Tort Law.

2. Is the making of statements without any factual basis or reasonable inquiry as to the truthfulness of those statements, sufficient evidence of actual malice to require submitting of the issue to the finder of fact.

3. Is evidence of mental pain and suffering and emotional distress sufficient for purposes of having the issues submitted to the finder of fact.

CERTIFICATE OF INTERESTED PARTIES

I hereby certify that:

1. The judge below was the Honorable Peter Webster.

2. Plaintiff below, petitioner in this Court, is Preston Drummer.

3. Counsel for plaintiff below, petitioner in this Court, is John F. MacLennan, Kattman, Eshelman & MacLennan, P.A.

4. Defendants below, respondents in this Court, are Robert Noel and General Cinema Beverages of North Florida, Inc.

5. Counsel for defendants below, respondents in this Court, are Patrick D. Coleman and Timothy B.

Strong, Coffman, Coleman, Andrews & Grogan.

Respectfully submitted,

John F. MacLennan

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Attorneys for Petitioner

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CITES TO THE CIRCUIT COURT, AND DISTRICT COURT OF APPEALS FIRST DISTRICT STATE OF FLORIDA

The opinion of the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, Case No.: 86-12378-CA is unpublished. The opinion of the District Court of Appeals, First District, State of Florida, Case No.: 87-180 is also unpublished.

STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

The final summary judgment by the trial court was entered on April 21, 1987. The per curiam affirmance of the District Court of Appeals, First District, State of Florida was entered on February 11, 1988.

Petitioner is authorized to seek review of this matter by certiorari pursuant to 28 U.S.C., Section 2101.

STATEMENT OF THE CASE AND THE FACTS

Preston Drummer ("Drummer") commenced this action for libel with the filing of his complaint in State Circuit Court on September 8, 1986. Robert Noel's ("Noel") motion to dismiss was denied by Order dated December 3, 1986. An amended complaint was filed by Drummer on December 17, 1986 adding General Cinema Beverages of North Florida, Inc., as a defendant. Both defendants filed a motion for summary judgment on March 9, 1987. Final summary judgment for defendants was granted by the lower tribunal on April 21, 1987. Drummer filed his notice of appeal on May 18, 1987.

The complaint arose out of a union organizing campaign which took place at General Cinema's Pepsi Cola Bottling Plant in Duval County Florida.

Drummer was involved in that organizing campaign as business representative of Local 512 International Brotherhood of Teamsters ("Local 512"). Defendant Noel was employed as the general manager of defendant General Cinema's Pepsi Cola Bottling Plant.

On August 26, 1986, Noel published a letter addressed to all of the employees of Pepsi Cola which letter contained the following statements referring to Drummer:

(a) "Preston Drummer is a liar and he is insulting your intelligence to boot. He is a slick little hustler in a Cadillac and a three piece suit. He has been sneaking around here for over a month whispering things to his pets and starting rumors".

. . .

(d) "Slick Preston is playing you for a fool. Don't let him get away with it. His lies have already cost hundreds of people their jobs. Don't let him gamble with yours."

. . .

(g) "In fact, Preston is so well thought of at Paramount Poultry where his union has represented the employees for over 20 years that he is not even allowed in the plant." . . .

(h) "Preston Drummer gets paid nearly $50,000.00 a year to con hard working people like you out of their hard earned money. I am told that the way he usually operates is he picks a girlfriend in the place he is trying to organize and works through her. Then as soon as the election is over he drops her like a bad habit and moves on to his next victim."

On September 12, 1986, defendant Noel published a second letter which contained the following statement referring to Drummer:

(a) "I pointed out that he was whispering lies to his pets at secret meetings and encouraging them to spread these lies and rumors around the plant."

. . .

On or about October 9, 1986, Noel published a letter to all Pepsi Cola employees containing the following statements concerning Drummer:

(a) "Preston is trying a new sneaky tactic. He is writing letters and filing unfair labor practice charges and using someone else's signature."

(b) "Preston has cost hundreds of hardworking people right here in the Jacksonville area their jobs through

violent strikes."

(c) "Let's have Preston explain why he is afraid to sign his own name to the letters and unfair labor practice charges."

On or about October 21, 1986, defendant Noel published in a letter addressed to all Pepsi Cola employees containing this statement concerning Drummer: "Preston Drummer is a desperate man. Lately, he has resorted to a childish lawsuit against me as well as outrageous lies and absurd promises to you."

Drummer alleged in his amended complaint that the defendants intended to mean by these statements that Drummer is a dishonest person, lacked uprightness of character, moral and business integrity, and is untruthful. Drummer further alleged that the

statements alleged were false and were known by the defendants to be false and were made by the defendants with actual knowledge and with the intent to injure the plaintiff.

In his deposition Drummer testified that the statements that he was a liar were false. Drummer deposition page 104. Further in his affidavit, Drummer affirmed that said statements were completely false.

In support of their motion for summary judgment defendants filed affidavits of Noel and Mr. D. Paul Sommerville. Mr. Sommerville is a management consultant whose job is to assist employers during organizational campaigns by labor unions. Sommerville stated in his affidavit he assisted Mr. Robert Noel in the organizing campaign

by Local 512. Sommerville stated that based on his experience in organizing campaigns, unions normally promise that the union can obtain increased wages, benefits and job security. Mr. Sommerville did not state that anyone told him that Preston Drummer was in fact making such promises. With respect to the allegation in the letters sent out by Mr. Noel that Preston Drummer had prepared letters but had not signed them in his own name, Mr. Sommerville states that since the letters were relatively well written he "reasonably assumed that the unsigned campaign literature . . . were either authored by or initiated by Preston Drummer." Mr. Noel in his deposition further stated that he had no evidence whatsoever that Preston Drummer had engaged in telling lies as is stated in the letters. Drummer testified in

his deposition and in his affidavit that he had suffered mental anguish as a result of the letters referred to in the amended complaint. Drummer deposition page 214.

The petitioner sought to bring this action purely under Florida State Law concepts of libel. The respondents in their motion to dismiss and motion for summary judgment raised the issues that:

1. The language used by Respondents was absolutely protected as a matter of Federal Labor Law policy as set forth in previous decisions of this Court.

2. Drummer failed to create an issue of material fact as to the existence of actual malice on the part of Respondents.

3. Drummer failed to demonstrate an issue as to damages suffered so as to meet the requirements of previous decisions of this Court.

The trial court in its final summary judgment ruled that the statements made by defendants were the type of rhetoric which is absolutely protected in a labor organizational campaign. The trial court further ruled that there was no genuine issue raised as to the existence of actual malice on the part of Respondents. Finally, the trial court ruled that Petitioner had failed to create a genuine issue as to damages suffered so as to satisfy the requirements of previous holdings of this Court.

ARGUMENT

I. THIS COURT SHOULD DETERMINE WHETHER CALLING PETITIONER PRESTON DRUMMER A LIAR AND OTHER SIMILAR STATEMENTS DURING A UNION ORGANIZING CAMPAIGN IS THE TYPE OF RHETORIC PROTECTED BY FEDERAL LABOR POLICY SO AS TO DEPRIVE PETITIONER OF ANY REDRESS FOR DAMAGES UNDER FLORIDA STATE TORT LAW.

The District Court of Appeals, First District, State of Florida, the court of last resort for Drummer's appeal rights within the state court system of Florida, affirmed without opinion the summary judgment of the trial court judge that held that petitioner's action for libel against respondents for having made statements such as calling petitioner a liar in written communications to numerous employees of respondent General Cinema

was protected rhetoric under federal labor policy so as not to give rise to any claim for libel under Florida tort law.

Drummer submits that this court should determine the questions presented because the decision of the trial court as affirmed by the District Court of Appeal is in conflict with prior decisions of this court.

The undisputed evidence presented to the trial court was that respondents circulated written communications to the employees of General Cinema, Jacksonville, Florida, stating, inter alia:

> "Preston Drummer is a liar . . . he was whispering lies to his pets at secret meetings and encouraging them to spread these lies around the plant . . . he is writing letters and filing unfair labor practice charges and using someone else's signature."

The trial court in its summary judgment in favor of respondents, cited this Court's decisions in Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966) and Old Dominion Branch No. 496 National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974) for the proposition that the statements made above and others made by respondents "fall squarely within the type of "loose language" and "rhetorical hyperbole" which the Supreme Court has recognized is common in organizing campaigns and absolutely protected under federal labor laws.

Drummer submits that the trial court judge completely misunderstood this Court's decisions in Linn and Austin. In Linn the plaintiff sued over communications made, as in Drummer's

case, in an organizing campaign. Those statements were that the plaintiff was a liar and dishonest. The district court dismissed the complaint, holding that the action was within the exclusive jurisdiction of the National Labor Relations Board. The Court of Appeals for the Sixth Circuit affirmed. This Court however reversed, expressly holding that the use of such language as "liar" is not protected by federal labor law policy. In the later decision in Letter Carriers v. Austin, this Court noted that its determination as to what language is protected in the context of a union organizing campaign had already been made in Linn. This Court characterized Linn as a case in which the plaintiff had been charged with "lying" and "robbing".

Drummer submits that the record in his action could not be clearer that respondents have made against Drummer precisely the type of accusations and statements that this court in Linn found to be unprotected by federal labor law policy.

While the actual contours as to what language is absolutely protected by this Court's holdings in Linn and Austin in the union organizing campaign context is not clear, it is clear beyond dispute that statements such as "Preston Drummer is a liar" are not protected. The trial court's determination as upheld on appeal that such statements enjoy absolute protection by virtue of federal labor policy as expounded in this Court's decisions in Linn and Austin is completely incorrect.

As this Court in discussing Linn said in Austin:

> "The court found that the exercise of state jurisdiction over such defamation actions would be a 'merely peripheral concern' of the federal labor laws, within the meaning of Garmon, as long as appropriate substantive limitations were imposed to ensure that the freedom of speech guaranteed by federal law was protected. Further the court recognized and 'overriding state interests' in protecting its residence from malicious libels".

II. IS THE MAKING OF STATEMENTS WITHOUT ANY FACTUAL BASIS OR REASONABLE INQUIRY AS TO THE TRUTHFULNESS OF THOSE STATEMENTS, SUFFICIENT EVIDENCE OF ACTUAL MALICE TO REQUIRE SUBMITTING OF THE ISSUE TO THE FINDER OF FACT?

Among the substantive protections, this Court has determined that petitioners such as Drummer must demonstrate actual malice as that term was defined by this Court in New York

Times, Co., v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed 2d 686 (1964). The trial court in its final summary judgment ruled that:

> "The court concludes that, from the evidence before it there exists no genuine issue of material fact upon which a reasonable jury could find, even by a preponderance of the evidence, that the offending statements were published with actual malice".

By deposition, respondent Noel testified that he had no evidence or information to support his statements that Preston Drummer was a liar. Noel stated in his deposition that he based his allegation that Drummer was a liar on the assumption that union organizers always make promises during union organizing campaigns as to what they can accomplish for employees and those promises are always false. With respect

to statements that Drummer was author of certain unfair labor practice charges and letters sent out, signed by a fellow employee, Noel again stated he had no facts on which those statements were based. In other words, the respondents had no evidence whatsoever proving or tending to prove that the statements made that Drummer was a liar and guilty of dishonest conduct in sending out letters under a false signature were true. The trial court, in what must be seen as a gross misreading of applicable law, held that since Drummer did not prove that the respondents knew the allegations were false, Drummer had not shown the requisite actual malice. The trial court appeared to rely on statements made by Noel and his consultant that they believed all the statements to be true.

This Court's decision in St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323 (1968) demonstrates that Drummer presented sufficient evidence of actual malice so as to defeat summary judgment. As this Court commented at 88 S.Ct at page 1326:

> "The defendant in a defamation action brought by a public official cannot, however, automatically ensure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is a product of his imagination, or is based wholly on an unverified anonymous telephone call". (Emphasis supplied).

In Drummer's case, there was not even an "unverified anonymous telephone call" to support respondents' statements that Drummer was a liar and guilty of

other dishonest conduct. Those statements were indeed, as this Court put it in St. Amant, "fabricated by the defendant" or "the product of his imagination".

III. IS EVIDENCE OF MENTAL PAIN AND SUFFERING AND EMOTIONAL DISTRESS SUFFICIENT FOR PURPOSES OF HAVING THE ISSUE SUBMITTED TO THE FINDER OF FACT?

The trial court further concluded that Drummer did not adequately demonstrate damages as required by this Court's decision in Linn. In Linn, this Court stated at 15 L.Ed. 2d 591:

> "We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. (Emphasis supplied)

Indeed this court recognized that punitive damages would be available provided that actual damages had been demonstrated.

Florida tort law recognizes that "actual damages" in an action for libel include not only pecuniary losses but also mental pain and suffering and injury to reputation. Miami Herald Publishing, Co., v. Brown, 66 So.2d 679 (Fla. 1953). In his affidavit, petitioner stated that as the result of the statements made by respondent, he suffered mental pain and suffering and emotional distress. Drummer further stated in his deposition that he had suffered sleepless nights as a result of the libelous statements. Clearly such evidence demonstrates sufficient "actual damages" so as to defeat summary judgment.

Drummer has been summarily denied his right to have the finder of fact determine his libel action based primarily upon conclusions by the trial court, affirmed without opinion on appeal, that federal labor law policy as embodied in this Court's previous decisions absolutely protects statements made in union organizing campaigns that participants in those campaigns are liars and guilty of dishonest conduct. Such conclusions fly in the face of this Court's previous pronouncements as does the trial court's determination that somehow Drummer failed to submit sufficient evidence to create a genuine issue of material fact as to the existence of actual malice or recoverable damages.

CONCLUSION

This Court should grant this petition for certiorari and consider this case on the merits so that this Court's previous determinations that not all communications during union organizing campaigns are absolutely protected and that a mere subjective belief that statements made were truthful is insufficient to take the issue of actual malice away from the finder of fact.

For all the reasons stated above, petitioner respectfully requests this Court grant the petition and consider the issues raised by the petition on the merits.

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused three copies of the foregoing Petition for Writ of Certiorari to be served on each counsel for respondent, by first-class mail, postage prepaid, as follows:

Patrick D. Coleman
Timothy B. Strong

Coffman, Coleman, Andrews & Grogan
Post Office Box 40089
Jacksonville, Florida 32203

Dated this _____ day of May, 1988.

Kattman, Eshelman & MacLennan, P.A.
1920 San Marco Boulevard
Jacksonville, Florida 32207
(904) 398-1229

By: _____
John F. MacLennan
Counsel for Petitioner

A P P E N D I X

APPENDIX

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

PRESTON DRUMMER,

Appellant,

CASE NO. 87-180

vs.

ROBERT NOEL and GENERAL CINEMA BEVERAGES OF NORTH FLORIDA, INC.,

Appellees.

Opinion filed February 11, 1988.

An Appeal from the Circuit Court for Duval County.

John F. MacLennan of Kattman, Eshelman & MacLennan, P.A., Jacksonville, for Appellant.

Patrick D. Coleman and Timothy B. Strong of Coffman, Coleman, Andrews & Grogan, Jacksonville, for Appellees.

PER CURIAM

AFFIRMED.

BOOTH, WIGGINTON, and ZEHMER, JJ., CONCUR.

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 86-12378-CA

DIVISION: CV-E

PRESTON DRUMMER,

Plaintiff,

v.

ROBERT NOEL and GENERAL CINEMA BEVERAGES OF NORTH FLORIDA, INC.,

Defendants.

_____/

FINAL SUMMARY JUDGMENT

This action is before the Court on a motion for summary judgment filed

by defendants, General Cinema Beverages of North Florida, Inc., and Robert Noel, General Cinema's vice-president and general manager. The Court has heard argument of counsel and read the pleadings, depositions and affidavits filed.

The amended complaint alleges that plaintiff was, at all relevant times, a business representative and officer of Teamsters Local No. 512, and that one of plaintiff's duties was to "'organize employees of companies in order that those employees may be represented for collective bargaining purposes by Local 512.'" According to the amended complaint, defendant Noel, acting as an employee of defendant General Cinema, published four letters to employees of defendant General Cinema which contained false and defamatory

statements regarding plaintiff. (The letters are attached as exhibits to the amended complaint). The amended complaint alleges that defendants either knew the statements were false or published them with reckless disregard of whether they were true or false; that defendants failed to make any reasonable inquiry regarding the truth of the statements; and that the falsity of the statements would have become apparent to defendants had they made reasonable inquiry. It is further alleged that:

> As a result of the actions of defendants
>
> . . . , plaintiff has suffered damage to his business reputation and his personal reputation in the community. Plaintiff has further

> suffered emotional distress and mental pain and suffering. Plaintiff has further been injured in his ability to carry out his chosen trade and profession as a union organizer [sic] and business agent.

The amended complaint seeks compensatory damages for

> loss of earning capacity; physical pain and inconvenience; mental pain and suffering and emotional distress; injury to [plaintiff's] good reputation; and future mental pain and suffering; physical distress; embarrassment and humiliation; and future financial loss . . . .

Defendants filed an answer denying all material allegations of the amended complaint. In addition, they pleaded as affirmative defenses that the

alleged defamatory statements are true; that the statements are pure opinion, based on a factual predicate, and are, therefore, privileged under the first amendment to the United States Constitution; that the statements were made during a union campaign and, therefore, this action is preempted by the National Labor Relations Act; and that, considered in context, the statements are, as a matter of law, not defamatory.

In their motion for summary judgment, defendants present several grounds, many of which the Court believes are well-taken. Each will be addressed in turn.

It is undisputed that the letters were written during a campaign by Teamsters Union to organize employees

of defendant General Cinema's Jacksonville Pepsi Cola Bottling Plant. It is likewise undisputed that plaintiff was the principal Teamsters' organizer involved. The United States Supreme Court has recognized that campaigns such as that involved in this action

> are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language. Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 58 (1966).

Because the National Labor Relations Act

(29 U.S.C. Section 141 et seq.) was found by the Court to manifest a congressional intent to encourage free, uninhibited, robust and wide-open debate on issues dividing labor and management (Linn, at 64); the Court, in Linn, placed major restrictions on the right of a party involved in an organizing campaign to maintain a state libel action.

Linn and Old Dominion Branch No. 496, National Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974), a subsequent Supreme Court decision, clearly holds that use of words such as "traitor", "crook" and the like in a loose, figurative sense during organizing campaigns "is merely rhetorical hyperbole" and "lusty and imaginative expression". Letter Carriers, at 284-86. As such, it is nothing more than

opinion, no matter how perjorative or pernicious, and is absolutely protected under the federal labor laws. Letter Carriers, at 284. The Court has carefully read the letters which form the basis for plaintiff's complaint and concludes that they fall squarely within the type of "loose language" and "rhetorical hyperbole" which the Supreme Court has recognized is common in organizing campaigns and absolutely protected under federal labor laws. In the Court's opinion, no reasonable reader of any of the letters could conclude other than that the statements plaintiff finds offensive were intended as opinions of the writer--"rhetorical hyperbole" published in the course of a hotly contested organizing campaign. See Letter Carriers, at 284-86. See

generally Hay v. Independent Newspapers, Inc., 450 So.2d 293 (Fla. 2d DCA 1984). For this reason, alone, the motion for summary judgment should be granted.

In Linn, the Court also "limit[ed] the availibility of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice", adopting "[t]he standards enunciated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964)". Linn, at 64-65. Thus, to prevail in this action, plaintiff must establish by clear and convincing evidence that the statements were false and that the statements were published with knowledge that they were false or with reckless disregard of whether they were false or not. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 285-86 (1964).

"[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth:. Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974). As the Court said in St. Amant v. Thompson, 390 U.S. 727, 731 (1968),

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

On a motion for summary judgment in a case such as this, where the New York Times standards apply, the proper test is whether, viewing the evidence most favorably to the party opposing the motion, there exists a genuine issue of material fact upon which a reasonable jury could find, by clear and convincing evidence, that defendants acted with "actual malice", i.e., with knowledge that the statements were false or with reckless disregard of whether they were false or not. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986); Lampkin-Asam v. Miami Daily News, Inc., 408 So.2d 666 (Fla. 3d DCA 1981). The Court concludes that, from the evidence before it, there exists no genuine issue of material fact upon which a reasonale jury could find, even by a preponderance of the evidence,

that the offending statements were published with "actual malice".

Defendant Noel's deposition establishes that that he relied entirely on D. Paul Sommerville, an independent management consultant hired to assist in opposing the organizing campaign, to prepare the letters for his signature. He testified that he had no reason to believe that any statements in the letters were untrue. In his affidavit, Mr. Sommerville sets forth in considerable detail the inquiries he made to obtain information about plaintiff before preparing the letters. He identifies specific individuals who provide the information. He states that he believed all of the statements made in the letters to be true when he wrote the letters, and that he still believes

them to be true. He also states that defendant Noel asked before signing the letters whether he had investigated the truth of their contents, and that he responded that he had made a thorough investigation and believed all of the statements were true. From this evidence, the Court concludes that defendants have carried their initial burden, placing on plaintiff the burden of presenting affirmative evidence to establish either that the defendants knew the statements were false or that they entertained serious doubts as to the truth of the statements.

In response to defendants' evidence, however, plaintiff offers nothing other than a bare conclusory statement in his affidavit that:

> The statements contained in the [letters] are false and were

> known, I believe, by the defendants to be false. Their publications were made with actual malice and with such reckless disregard and carelessness as to whether they were true or false as to indicate, I believe, an utter disregard for my rights.

Nowhere does plaintiff state the basis for his beliefs. In fact, despite repeated attempts by counsel during plaintiff's deposition to ascertain the basis for plaintiff's beliefs that defendants either knew that the statements were false or entertained doubts about their truth, plaintiff was unable to provide any substantive support for his beliefs. Plaintiff's "beliefs", without more, are simply not sufficient to establish the existence of

a genuine issue of material fact in the face of the evidence offered by defendants. See generally Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2514 (1986); Newton v. Florida Freedom Newspapers, Inc., 227 So.2d 906 (Fla. 1st DCA 1984). Accordingly, summary judgment is appropriate for this reason, as well.

Also, in Linn, the Court held that a plaintiff in a case such as this must establish that he has suffered harm of a form recognized by state libel law in order to prevail on his claim. Linn, at 65. Once again, however, other than the conclusory statements contained in plaintiff's affidavit regarding injury, plaintiff has offered no evidence to suggest any harm resulting from the offending statements. On the contrary, his deposition testimony strongly

suggests that he had not been harmed. The Court, therefore, concludes, that on this issue as well, there exists no genuine issue of material fact upon which a reasonable jury could find that plaintiff suffered any compensable harm as a result of publication of the letters. See generally Shiver v. Apalachee Publishing Co., 425 So.2d 1173 (Fla. 1st DCA 1983).

It is the Court's opinion that, for all of the foregoing reasons, the motion for summary judgment should be granted. Any other conclusion would be at odds with the pronouncements of the United States Supreme Court that state courts should exercise great caution in entertaining libel actions which arise out of labor organizing activities. Accordingly, it is

ORDERED and ADJUDGED that:

1. Defendants' motion for summary judgment is GRANTED.

2. Plaintiff shall take nothing by this action, and defendants shall go hence without day.

3. The Court retains jurisdiction for the purpose of taxing costs, upon an appropriate motion therefor.

DONE, ORDERED and ADJUDGED, at Jacksonville, Duval County, Florida, this 20th day of April, 1897.

/s/ Peter D. Webster

CIRCUIT JUDGE

No. 87-1857

In The

Supreme Court of the United States

October Term, 1987

PRESTON DRUMMER,

Petitioner,

v.

ROBERT NOEL and GENERAL CINEMA BEVERAGES OF NORTH FLORIDA, INC.,

Respondents.

On Petition For a Writ of Certiorari to The District Court of Appeal For The First District, State of Florida

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should substitute its judgment for the trial court's with respect to whether the statements in question, when considered in their context, are non-defamatory as a matter of law.

2. Whether the trial court applied the proper standard for proving actual malice in a defamation action which arises in the context of a labor dispute.

3. Whether the Florida courts properly held that the Plaintiff was not entitled to damages for mental pain and suffering under Florida State tort law.

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No. 87-1857

In The

Supreme Court of the United States

October Term, 1987

PRESTON DRUMMER,

Petitioner,

v.

ROBERT NOEL and GENERAL CINEMA BEVERAGES OF NORTH FLORIDA, INC.,

Respondents.

On Petition For a Writ of Certiorari to The District Court of Appeal For The First District, State of Florida

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Respondents agree with the Petitioner's statement of the dates of the Final Summary Judgment by the trial court and the *per curiam* affirmance by the First District Court of Appeal for the State of Florida. (Pet. 7).[1] The

[1]References to the Petition for Writ of Certiorari to the First District Court of Appeal of the State of Florida are indicated by the designation "Pet.", followed by the appropriate page number.

Petitioner does not state the grounds upon which jurisdiction is invoked, however. The Petitioner cites 28 U.S.C. § 2101 which merely sets forth the "*time*" for appeal or certiorari". (Emphasis added). The Petitioner, therefore, has not set forth the statutory provision which confers on this Court jurisdiction to review the judgment in question by writ of certiorari, as required by Rule 21, Sup. Ct. R. 21.1(e)(iv).

II. COUNTERSTATEMENT OF THE CASE AND THE FACTS

The Respondents agree with the statement of the case as set forth in the Petition, however, the Respondents further submit that subsequent to the Petitioner's filing his notice of appeal, the First District Court of Appeal for the State of Florida affirmed the trial court's Final Summary Judgment *per curiam* on February 11, 1988.

This case arose in the context of a labor dispute. The Petitioner engaged in a campaign to attempt to organize the employees of Respondent General Cinema Beverages of North Florida, Inc.'s ("General Cinema")[2] Pepsi Cola bottling plant located in Jacksonville, Florida. Respondent Robert Noel ("Noel") was the General Manager of the Jacksonville, Florida plant during this period. General Cinema hired Sesco Management, an outside consultant, to advise and counsel the Company concerning

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[2]General Cinema, more properly GCC Beverages, Inc. d/b/a Pepsi Cola Bottlers of Jacksonville, is a division of General Cinema Corporation. GCC Beverages, Inc. has no subsidiaries.

how to handle the organizing campaign. Noel dealt directly with Mr. D. Paul Sommerville ("Sommerville"), an employee of Sesco Management.

During the course of the organizing campaign, Noel published several letters to employees of General Cinema containing statements concerning Drummer. Sommerville provided Noel with all of the information contained in all of the letters which Drummer finds objectionable. Sommerville conducted a thorough investigation of Drummer's reputation, organizing tactics, and qualifications as a union official. Noel relied on Sommerville's investigation and on Sommerville's expertise as a management consultant in signing the letters. Noel believed that the statements contained in the letters were true.

III. REASONS FOR DENYING THE PETITION

As provided in Supreme Court Rule 17, review on writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 17.1. Such review will be granted "only when there are special and important reasons therefor." *Id.* This case presents no special or important reason to grant the Petition for Writ of Certiorari. There are no novel points of law for this Court to consider. The Circuit Court for the Fourth Judicial Circuit of the State of Florida correctly applied settled legal principles to the particular facts of this case. The trial court's decision does not conflict with any decision of this Court.

A. THIS COURT SHOULD NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE TRIAL COURT WITH RESPECT TO WHETHER THE STATEMENTS IN QUESTION, WHEN CONSIDERED IN THEIR CONTEXT, ARE NONDEFAMATORY AS A MATTER OF LAW.

The Petitioner submits that the decision of the trial court, as affirmed by the District Court of Appeal, is in conflict with prior decisions of this Court. (Pet. 18). Specifically, the Petitioner states that the trial court judge "completely misunderstood this Court's decisions in [*Linn v. United Plant Guard Workers of America, Local 114, et al.*, 383 U.S. 53 (1966)] and [*Old Dominion Branch No. 496, National Ass'n of Letter Carriers, et al. v. Austin*, 418 U.S. 264 (1974)]." (Pet. 19). In support of this contention, the Petitioner states that this Court has expressly held that the use of such language as "liar" is not protected by federal labor law policy, and that "it is clear beyond dispute that statements such as 'Preston Drummer is a liar' are not protected." (Pet. 20, 21). The Petitioner, rather than the trial court judge, completely misunderstood this Court's decisions in *Linn* and *Austin*.

The Petitioner's reliance on *Linn* for the proposition that the trial court was precluded from finding that the use of the word "liar" was a statement of opinion and constituted mere rhetorical hyperbole is erroneous. Although *Linn* did involve an accusation that the plaintiff "lied", the Court did not address the issue whether such a statement was defamatory as a matter of law. Rather, because the trial court in *Linn* had dismissed the case finding that statements made in the course of a labor dispute are absolutely protected, the United States Supreme Court remanded the case, stating that the plaintiff should be

given the opportunity to bring a defamation action in this context if he could plead and prove actual malice and damages. Just as the Court did not consider whether any of the statements alleged in *Linn* were true, or whether the statements were made with malice, neither did the Court address whether the statements were defamatory as a matter of law. Petitioner has concluded that, because the Court in *Linn* did not specifically hold that the statements in question were *not* defamatory as a matter of law, the Court must have intended that the statements were actionable per se. The negative inference that the Petitioner has apparently drawn based upon the *Linn* Court's failure to address the issue whether the statements were defamatory as a matter of law is specious.

Unlike *Linn*, the Court in *Austin* specifically considered whether the statements in question were defamatory as a matter of law. In *Austin*, the Court acknowledged that name-calling is a part of the give-and-take of a union organizing campaign, and that, considering its context, such activity is not actionable. The Court further recognized that the context in which the statements were made and the readers to whom the statements were directed are essential considerations necessary to determine whether the language to which an individual takes exception was a false statement of fact or a protected statement of opinion which constitutes mere rhetorical hyperbole. *Austin*, 418 U.S. at 285, 286. Although the Petitioner would have this Court consider the statements out of their context, in contravention of *Austin*, the lower court in the instant case considered the context in which the statements were made, as evidenced by its decision, which states:

> The Court has carefully read the letters which form the basis for Plaintiff's complaint and concludes that

> they fall squarely within the type of "loose language" and "rhetorical hyperbole" which the Supreme Court has recognized is common in organizing campaigns and absolutely protected under federal labor laws. In the Court's opinion, no reasonable reader of any of the letters could conclude other than that the statements Plaintiff finds offensive were intended as opinions of the writer—"rhetorical hyperbole" published in the course of a hotly contested organizing campaign.

(App. 11).[3] The trial court, therefore, considered the statements in their context in accordance with the Court's mandate in *Austin*.

The Petitioner's argument is based upon a misinterpretation of *Linn*. As indicated by its Final Summary Judgment, the trial court considered the standards enunciated by the Court in *Linn* and *Austin* in reaching its decision that the statements at issue fall squarely within the type of "loose language" and "rhetorical hyperbole" recognized by the Court as common in organizing campaigns and absolutely protected under federal labor laws. The Petitioner would apparently have this Court consider each specific statement that arises in the course of a union organizing campaign to determine whether, even taken out of context, the statements are actionable per se. The Petitioner's arguments do not warrant this Court's review.

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[3]References to the Appendix which is attached to the Petitioner's Petition for Writ of Certiorari are indicated by the designation "App." followed by the appropriate page number.

B. THE TRIAL COURT APPLIED THE PROPER STANDARD FOR PROVING ACTUAL MALICE IN A DEFAMATION ACTION WHICH ARISES IN THE CONTEXT OF A LABOR DISPUTE.

As the Petitioner acknowledges, this Court has limited the availability of state court remedies for defamation based upon statements made in the context of a labor dispute to those instances where the complainant can show that the defamatory statements were circulated with malice and caused actual damages. *Linn*, 383 U.S. at 64, 65; *Austin*, 418 U.S. at 272, 273. Specifically, the availability of recovery in this case is governed by the standard for "actual malice" which was enunciated by the Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Linn*, 383 U.S. at 64, 65. To establish that the statement was made with "actual malice", a plaintiff must prove that the defendant knew that the statement was false or acted with reckless disregard as to whether it was false. *New York Times v. Sullivan*, 376 U.S. at 279, 280.

In his statement of the questions presented, the Petitioner has framed the second issue as follows:

> Is the making of statements without any factual basis or reasonable inquiry as to the truthfulness of those statements, sufficient evidence of actual malice to require submitting of the issue to the finder of fact.

(Pet. 1). Concerning the reference to "reasonable inquiry", the United States Supreme Court has specifically stated that mere proof of failure to investigate, without more, *cannot* establish reckless disregard for the truth. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1973).

The Petitioner states later in his Petition that:

> The trial court, in what must be seen as a gross misreading of applicable law, held that since Drummer

> did not prove that the Respondents knew the allegations were false, Drummer had not shown the requisite actual malice.

(Pet. 24). This is a flagrant misstatement of the basis for the trial court's decision. The implication that the statements in question were made "without any factual basis" is simply unsupported by the record. The trial court, in its Final Summary Judgment, recognized that Noel relied entirely on his management consultant to prepare the letters. (App. 15). The trial court also found compelling the considerable detail with which the management consultant set forth the inquiries made to obtain the information about Drummer before preparing the letters. (App. 15). The Petitioner's disregard for Sommerville's role in investigating the Petitioner's background and providing the information to which the Petitioner has taken offense is inexplicable.

A plaintiff cannot defeat a defendant's properly supported motion for summary judgment in a defamation case without offering any evidence but merely asserting that the jury might disbelieve the defendant's denial of malice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The trial court in the instant case noted that the only "evidence" of malice offered by the Petitioner was his conclusory argument that the offending statements were false and known by the Respondents to be false. (App. 16, 17). As the trial court stated, the Petitioner's "beliefs", without more, were not sufficient to establish the existence of a genuine issue of material fact concerning the existence of actual malice in light of the evidence offered by Respondents. (App. 17, 18).

The absurdity of the Petitioner's argument is probably best demonstrated by his reliance upon *St. Amant v. Thompson*, 390 U.S. 727 (1968) to support his position that he has demonstrated sufficient evidence of actual malice to defeat summary judgment. In *St. Amant*, the defendant (St. Amant) read a series of questions which had been posed to a member of a Teamsters Union local and the union member's responses thereto during a televised speech. The plaintiff took offense to the union member's responses which apparently linked the plaintiff to allegedly nefarious activities of the president of the local union. *Id.* at 728, 729. The United States Supreme Court found that these statements were *not* made by St. Amant with reckless disregard for their accuracy, notwithstanding that St. Amant had no personal knowledge of the plaintiff's activities, relied solely upon the union member's statements even though there was no information concerning the union member's veracity, failed to verify the information with anyone in the union office, and gave no consideration to whether the statements defamed the plaintiff. *Id.* at 730. Just as St. Amant's reliance upon the union member's responses to questions was reasonable and did not rise to a level of reckless disregard, likewise Noel's reliance upon Sommerville's statements and investigation does not constitute reckless disregard for the truth.

The Petitioner's second argument is based upon a mischaracterization of the evidence before the trial court. A review of the trial court's Final Summary Judgment confirms that the court applied the proper standard and, based on the Plaintiff's failure to create a genuine issue of material fact, granted the Defendants' Motion for Summary Judgment. The Plaintiff does not raise any issues worthy of this Court's review.

C. THIS COURT SHOULD NOT REVIEW THE DECISION OF THE FLORIDA STATE COURT CONCERNING THE PLAINTIFF'S ENTITLEMENT TO RECOVERY OF DAMAGES FOR MENTAL PAIN AND SUFFERING UNDER FLORIDA TORT LAW.

The Petitioner correctly states that a plaintiff who seeks state law remedies for libel based upon statements made in the context of a labor dispute may not recover unless he is able to prove actual damages. (Pet. 26); *Linn*, 383 U.S. at 64. As the Petitioner states, the Court in *Linn* allowed that such damages may include "whatever form of harm would be recognized by state tort law." *Id.* The Court in *Linn*, therefore, deferred to the states for a determination of the damages that may be recoverable in a defamation action. *Id.*

The trial court in the instant case, relying on Florida tort law precedent, concluded that there existed no genuine issue of material fact upon which a reasonable jury could find that the Petitioner suffered any compensable harm as a result of the alleged defamatory statements. (App. 19). Florida's First District Court of Appeal affirmed the decision of the trial court. (App. 2-3). Notwithstanding the pronouncements of the Florida courts, the Petitioner, citing precedent under "Florida tort law", submits that he offered sufficient evidence to create a genuine issue of material fact as to the existence of damages. (Pet. 27). The United States Supreme Court has previously stated that it has no authority to review state court determinations of purely state law. *International Longshoreman's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380 (1986). The Petitioner's argument that the trial court, as affirmed by the

District Court of Appeal, improperly applied Florida law concerning the standard for proof of emotional distress does not warrant this Court's review.

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IV. CONCLUSION

Since the Petitioner has not cited the statutory provision under which he asserts this Court's jurisdiction, the Respondents must glean the alleged basis for jurisdiction from the body of the Petition. Based upon the tenor of his arguments, the Petitioner apparently contends that the trial court's Final Summary Judgment, as affirmed by Florida's First District Court of Appeal, is in conflict with the Court's decision in *Linn* and *Austin*. A cursory review of the trial court's Final Summary Judgment confirms that the Petitioner's argument is without merit.

There is nothing exceptional about this case. The trial court applied the precedent established by this Court and reached the only reasonable conclusion; the Petitioner failed to create a genuine issue of material fact upon which a reasonable jury could find the Respondents liable under the standards established in *Linn* and *Austin*. (App. 4-20). Respondents respectfully submit that the Petition in this case does not present "special and important" reasons warranting review.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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